

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



v

**BLACK FOREST CAFÉ**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages  
RSA 275:43 V unpaid vacation time

**Employer:** Black Forest Cafe, 212 NH 101, Amherst, NH 03031

**Date of Hearing:** November 10, 2014

**Case No.** 48877

**BACKGROUND AND STATEMENT OF THE ISSUES**

A Wage Claim was filed with the Department of Labor on September 11, 2014. The notice was sent to the employer and there was an objection. The objection was sent to the claimant and there was a request for a hearing. The Notice of Hearing was sent to both parties on October 22, 2014.

The claimant testified that he worked for the employer for a little over a year. There was an employee handbook in place. The rule(s) on vacation time was that after one year of employment you received two weeks of vacation time. On August 30, 2013 the claimant became a full time employee.

The claimant stated that he had put in for a week of paid vacation time before his year was finished and the employer gave him the time off. He also put in for a week near the end of September of 2014. He gave his notice that he was getting through and that he would work until the end of September or until the employer found a replacement for him. Because the claimant had started his own business, not in competition with his current employer, the claimant said that the working atmosphere had become hostile. On September 5, 2014 the claimant quit his job. There was a replacement found for his position and he felt that because he had put in for the time off, he should not lose the week. He felt the leave should be paid because of this. He believes that it is outside of the use it or lose it rule.

The employer testified that the rules and regulations are in place. After one year of employment, the employee receives two weeks of vacation time. If the time is unused, it is forfeited. The claimant was given a week of paid time off prior to earning it and he was not employed when the second week he requested was scheduled.

At a meeting on September 5, 2014 the claimant said that he would work until September 7, 2014 but he never showed up for work after the September 5 meeting. The owners told him that he could leave because there was a replacement coming on board and the claimant agreed to the September 7 date.

### **FINDINGS OF FACT**

RSA 275:43 I Every employer shall pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee:

- (a) In lawful money of the United States;
- (b) By electronic fund transfer;
- (c) By direct deposit with written authorization of the employee to banks of the employee's choice;
- (d) By a payroll card provided that the employer shall provide to the employee at least one free means to withdraw up to and including the full amount of the employee balance in the employee's payroll card or payroll card account during each pay period at a financial institution or other location convenient to the place of employment. None of the employer's costs associated with a payroll card or payroll card account shall be passed on to the employee; or
- (e) With checks on a financial institution convenient to the place of employment where suitable arrangements are made for the cashing of such checks by employees for the full amount of the wages due; provided, however, that if an employer elects to pay employees as specified in subparagraphs (b), (c), or (d), the employer shall offer employees the option of being paid as specified in subparagraph (e), and further provided that all wages in the nature of health and welfare fund or pension fund contributions required pursuant to a health and welfare fund trust agreement, pension fund trust agreement, collective bargaining agreement, or other agreement adopted for the benefit of employees and agreed to by the employer shall be paid by every such employer within 30 days of the date of demand for such payment, the payment to be made to the administrator or other designated official of the applicable health and welfare or pension trust fund.

This is the section of the law that mandates an employer to pay all wages due when the wages are due and owing.

RSA 275:43 V Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due.

This part of the law places an issue such as vacation time into the category of wages when the time is due and owing.

It is the finding of the Hearing Officer, based on the written submissions and the testimony presented for the hearing, that the Wage Claim is invalid. The claimant has the burden to show that there is time due and owing and he did not meet this burden.

The employer was credible in his testimony that the issue of vacation time was a written policy but the employer was flexible in the use of the leave. In this case it was shown that the claimant did get a week off prior to earning the leave.

The record also shows that the claimant gave the employer until September 30, 2014 to find a replacement for his position. If this had of been the case, the requested second week would have been used. Instead the testimony shows that the claimant left work after the meeting on September 5 and did not return to work.

The employer was also credible that the policy was "use it or lose it". The second week of vacation was lost when the claimant left work on September 5, 2014.

The Wage Claim is invalid.

### **DECISION**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as RSA 275:43 V considers vacation pay to be wages, when due, if a matter of employment practice or policy, or both, and as this Department finds that the claimant failed to prove by a preponderance of the evidence that he is due any vacation pay, it is hereby ruled that the Wage Claim is invalid.

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Thomas F. Hardiman  
Hearing Officer

Date of Decision: December 4, 2014

Original: Claimant  
cc: Employer

TFH/slh